ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CA06-1026, CA07-39

May 30, 2007

KRISTY BEVERLIN & WILLIAM BEVERLIN APPELLANTS	APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT, [JV-06-271]
V.	HONORABLE VICKI S. COOK, JUDGE
ARKANSAS DEPARTMENT OF HEALTH & HUMAN SERVICES APPELLEE	AFFIRMED

Appellants, Kristy and Billy Beverlin, have three children, I.B. (8/31/02), L.B. (2/27/06), and W.B. (8/24/01). Their appeals in case numbers CA06-1026 and CA07-39 involve only W.B., and, therefore, we address these two cases together. In CA06-1026, they appeal from the trial court's adjudication of W.B.'s dependency/neglect, and in CA07-39, they appeal from the trial court's order terminating their parental rights to W.B. We affirm both decisions.

Precipitating Events

In April 2006, appellants' two youngest children, I.B. and L.B., were residing with appellants in their home. These two children were removed pursuant to an order for emergency custody because the mother, Kristy, who was recovering from a C-section after the birth of L.B. in February, was arrested for outstanding traffic warrants. The father, Billy, was not responsive, having been diagnosed with bipolar/schizophrenia, and the "environmental neglect [at the house] was beyond the safety of the children." W.B. was staying with his great-grandmother at that time in Monticello, and his name was not included in the April 17, 2006 emergency order. The great-grandmother did not have legal custody and was not authorized to provide medical care for W.B.

On April 20, 2006, a probable-cause hearing was held regarding I.B. and L.B. In the resulting probable-cause order, the trial court added a paragraph numbered fifteen, which provided: "Court orders a 72-hour hold on [W.B.]. Court orders the dept. to file a TPR petition as to [W.B.]." On April 24, 2006, DHHS filed its petition for emergency custody of W.B., and on that same date, the trial court entered its order for emergency custody of W.B. A separate probable-cause hearing for W.B. was not held. On April 26, 2006, DHHS filed its petition to terminate appellants' parental rights concerning W.B.

On May 11, 2006, the dependency/neglect adjudication hearing was held and the adjudication order, which was filed the same day, included the finding that all three juveniles were dependent/neglected.

On May 24, 2006, appellants filed a motion for reconsideration, asking the trial court to set aside its finding of dependency/neglect as to W.B. because he had been placed on the seventy-two-hour hold without "sufficient evidence, affidavit or finding" that, with respect to him, an emergency existed, or that he was exposed to conditions in the home that created an emergency, or that he was in imminent danger. In short, appellants argued that W.B. was never exposed to the conditions that led to the removal of his siblings from their home because he was not even there; rather, he was with his great-grandmother in another town. The motion was deemed denied after the passage of thirty days. Appellants did not challenge the dependency/neglect finding with respect to the other two children, who were actually living in the parental home.

The termination hearing was held on September 27, 2006. The order terminating appellants' parental rights to W.B. was filed on October 3, 2006.

CA06-1026 (Dependency/Neglect Adjudication)

In this first appeal, appellants contend that the trial court's finding that W.B. was dependent/neglected is clearly erroneous and clearly against the preponderance of the evidence. The gist of appellants' argument is simple. They contend that W.B. was not exposed to inappropriate conditions because he was living outside the home with his paternal great-grandmother. We find no merit in the argument.

Dependency-neglect must be established by a preponderance of the evidence. Ark. Code Ann. § 9-27-325(h)(2)(B) (Supp. 2005). We review a trial judge's findings of fact *de*

novo and will not set them aside unless they are clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of the witnesses. *Brewer v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 364, 43 S.W.3d 196 (2001). A finding is clearly erroneous when, although there is evidence to support the finding, after reviewing all of the evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Hopkins v. Arkansas Dep't of Human Servs.*, 79 Ark. App. 1, 83 S.W.3d 418 (2002).

Here, the trial court expressed its dismay over the fact that the file on this family was thick, representing a year and a half of "hands-on working with these parents," and that the same unhealthy environment that had been the problem in the past had reemerged. Photographs of the house that were introduced by DHHS showed the house to be in a state of filth, not just "cluttered," as appellant Kristy Beverlin described it.

Arkansas Code Annotated section 9-27-303 (18)(A) (Supp. 2005) provides:

> (18)(A) "Dependent-neglected juvenile" means any juvenile who is at substantial risk of serious harm as a result of:
>
> (i) Abandonment;
>
> (ii) Abuse;
>
> (iii) Sexual abuse;
>
> (iv) Sexual exploitation;
>
> *(v) Neglect;*
>
> *(vi) Parental unfitness to the juvenile, a sibling, or another juvenile; or*

(vii) Being present in a dwelling or structure during the manufacturing of methamphetamine with the knowledge of his or her parent, guardian, or custodian.

(Emphasis added.) Arkansas Code Annotated section 9-27-303 (36)(A) (Supp. 2005) defines "neglect" in part as:

"Neglect" means those acts or omissions of a parent, ... which constitute:

. . . .

(iv) Failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the juvenile, including failure to provide a shelter that does not pose a risk to the health or safety of the juvenile[.]

In light of the fact that appellants do not even challenge the finding of dependency/neglect with respect to W.B.'s siblings, who *were* present in appellants' house, their conduct, at a minimum, satisfies section 9-27-303 (18)(A)(vi) above. In *Brewer v. Department of Human Services*, 71 Ark. App. 364, 368, 43 S.W.3d 196, 199 (2000), this court explained that "[p]arental unfitness is not necessarily predicated upon the parent's causing some direct injury to the child in question. .... To require Logan to suffer the same fate as his older sister before obtaining the protection of the state would be tragic and cruel."

At the adjudication hearing, the trial court explained that W.B. had to be placed in somebody's custody legally; that the great-grandmother did not have that status; and that the court was going to make certain that the parents did not retain legal custody of him in light of the conditions in the home that led to the removal of the other two children. We find nothing erroneous in the trial court's logic. Otherwise, the parents could have

demanded that the great-grandmother return W.B. to them, and he would have been in the same situation as his siblings. Analogizing the instant situation to that presented in *Brewer, supra*, we conclude that to require W.B. to suffer the same fate as his other siblings before obtaining the protection of the State would be tragic and cruel.

Appellants further contend that the trial court failed to require an affidavit and failed to make specific findings of fact, resulting in the "lack of a proper record at the trial level" and mandating reversal. However, appellants cite no convincing legal authority nor do they make a convincing argument that reversal is mandated under the circumstances of this case. DHHS acknowledges that the better practice, and the one required by statute, is that a petition be accompanied by an affidavit that allows the parents to know what the allegations against them are and explains to the court why emergency custody is necessary. Here, the second petition was prepared pursuant to the trial court's order, and it essentially corrected the oversight of omitting W.B. in the first petition, which *had* an accompanying affidavit. W.B., although out of the house at the time the emergency custody was first undertaken, was nevertheless within appellants' legal custody, not the great-grandmother's custody. Because of the trial court's history with this family, the existence of W.B. was known from the outset of the hearing and, as demonstrated by the trial court's handwritten insertion of paragraph fifteen dealing with W.B., the trial court considered him to be a part of the case. Similarly, a probable-cause hearing *was* held outlining the problems asserted by DHHS with respect to the other two children, which necessarily also affected W.B. Assignments of error unsupported by convincing argument or authority will not be

considered on appeal unless it is apparent without further research that the point is well taken. *Rodriquez v. Arkansas Dep't of Human Servs.*, 360 Ark. 180, 200 S.W.3d 431 (2004).

CA07-39 (Termination)

This second appeal contains multiple points raised by appellants. For their first point, appellants contend that the trial court lacked jurisdiction to terminate while the adjudication order was being appealed. We disagree.

In *Harwell-Williams v. Arkansas Department of Human Services*, 368 Ark. 183, ____ S.W.3d ____ (2006), our supreme court was asked to determine whether the trial court had jurisdiction to hold an additional hearing subsequent to the filing of a notice of appeal and the lodging of a trial transcript. The additional hearing was one in which the mother's parental rights were terminated, and it was held during the pendency of the mother's appeal of an adjudication of dependency/neglect. The supreme court held that the trial court retained jurisdiction to conduct further hearings, explaining:

> Although Appellant filed a notice of appeal from the May 18, 2005 order, the juvenile division of the circuit court retained jurisdiction to conduct further hearings because the case involved a juvenile out-of-home placement. Arkansas Code Annotated § 9-27-343 (c) (Supp. 2005) specifically states that "[p]ending an appeal from any case involving a juvenile out-of-home placement, the juvenile division of the circuit court retains jurisdiction to conduct further hearings." Therefore, the trial court had jurisdiction to proceed with the final hearing on Appellant's termination of parental rights as to C.H. The final order of judgment as to C.H. was entered on December 13, 2005.

368 Ark. at 186, ____ S.W.3d at _____.

Appellants attempt to distinguish *Harwell* by noting that the supreme court did not address in *Harwell* their argument concerning the language contained in Rule 2(c)(2) of the Rules of Appellate Procedure, noting the difference in the language between section 9-27-343(c) and Rule 2(c)(2) of our Rules of Appellate Procedure, which provides:

> (2) Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction *to conduct review hearings*.

(Emphasis added.) That is, the statute provides that the trial court retains jurisdiction "to conduct further hearings," while Rule 2(c)(2) provides that the trial court retains jurisdiction "to conduct review hearings." *Harwell* relies upon the statute, and does not mention the rule.

We have concluded that *Harwell* controls the jurisdictional issue presented in the instant case. We can presume that the supreme court knew the provisions of Rule 2(c)(2) when it decided *Harwell*, and appellants have not persuaded us that we are not bound by the decision in *Harwell*.

For their second point, appellants, without more, set forth our standard of review on findings of fact and statutory construction. It is, therefore, unnecessary to address the second point.

As their third point, appellants contend that the termination hearing was not held within ninety days as required by statute. The petition to terminate parental rights was filed on April 26, 2006, and the termination hearing was held on September 27, 2006. The hearing had originally been scheduled for July 13, 2006, which would have been within

the ninety-day time limitation; however, it was continued first to August 30, 2006, and then to September 27, 2006. Section 9-27-341(d)(1) provides that "[t]he court shall conduct and complete a termination of parental rights hearing within ninety (90) days from the date the petition for termination of parental rights is filed unless continued for good cause as articulated in the written order of the court." Not only did appellants not object to the continuances below, other than quoting this section of the statute, they cite no other authority, do not develop a convincing argument, and offer no explanation as to how they were prejudiced by the delay. While we agree with appellants that the termination hearing was held beyond ninety days from the filing of the petition to terminate, that fact provides no basis for reversal under the circumstances of this case.

Under their fourth point, appellants contend that they were not provided with proper notice regarding the specific allegations against them that would support termination of their parental rights. However, they merely recite *one* of the paragraphs contained in the petition to terminate, which stated "other factors or issues arose." There were other paragraphs that were more specific. Further, DHHS and the court had had a long history with appellants. Finally, appellants provide no argument as to how they were surprised or prejudiced by anything that was presented by DHHS at the termination hearing. We find no basis for reversal here.

For their fifth point, appellants contend that they are reasserting every ground for reversal raised in their appeal of the adjudication order and contending that unless the adjudication is affirmed in its entirety, any reversal or remand of that order should be fully

considered prior to termination. As discussed previously, we are affirming the adjudication of dependency/neglect in its entirety, rendering this point moot.

As their sixth point, appellants note their objection to the fact that the petition to terminate did not allege that W.B. was out of the home for twelve months "as required by the termination statute." Otherwise, they provide us with no convincing argument, no citation to legal authority, and no explanation of how they were prejudiced. Accordingly, we find no basis for reversal.

Under their seventh point, appellants challenge the sufficiency of the evidence supporting the termination of their parental rights to W.B., contending that the evidence does not support the findings: 1) that W.B. continued out of the custody of the parents for twelve months, and 2) that the parents failed to support or maintain contact. We disagree with both assertions.

1) Out of Parents' Custody for 12 Months

There was an abundance of evidence to support the finding that W.B. had lived outside his parents' home for more than twelve months. W.B. was born in August 2001. During his first six years of life, he was initially removed from his parents' custody in a DHHS case and placed with his great-grandmother. That removal lasted from February 11, 2002, through January 22, 2003. Thereafter, DHHS again removed W.B. from appellants' custody on April 11, 2006, and he remained out of their custody through the date of the termination hearing, September 27, 2006. It is unnecessary to outline the other extensive periods of time that W.B. spent with his great-grandparents because these two

periods alone more than satisfy the twelve-month requirement. Arkansas Code Annotated section 9-27-341(b)(3)(B)(ii)(a) makes it clear that the required time period does not have to be consecutive nor does it have to immediately precede the filing of the petition for termination. We find no basis for reversal here.

2) Failed to Support or Maintain Contact

Under this subsection, appellants contend that the evidence did not support a finding that appellants failed to provide support or maintain contact. We disagree. Appellants acknowledge that they did not pay the $41 per week that was ordered on May 12, 2006, contending that at most the time period only amounts to five months. However, the evidence showed that they only paid the great-grandmother $93 during the entire time W.B. stayed with her. We note that they were living rent-free in a house supplied by appellant Billy Beverlin's father. We find no basis for reversal here.

For their eighth point, appellants contend that the evidence does not support a finding of "meaningful effort to rehabilitate." Appellants attempt to limit consideration under this point to the events of 2006, *i.e.*, the most recent removal of W.B. However, they cite no controlling legal authority nor provide any convincing argument why the trial court cannot consider the past history of the family with DHHS and the courts. Looking back at the entire history of the case, it is clear that there has been a meaningful effort to rehabilitate, and that while those efforts turned the tide for a brief period of time, appellants lapsed back into, not just cluttered living conditions, but filthy living conditions,

which DHHS discovered when the mother was arrested and the father was "unresponsive" and unable to care for the children. We find no basis for reversal here.

For their ninth point, appellants contend that the evidence does not support a finding that "the conditions that caused removal ... have not been remedied." We disagree. In their reply brief, appellants clarify that they seek reversal under this point because appellee failed to file a case plan with the court, even though appellants quote from it in their argument. Appellants provide us with no convincing argument, no citation to legal authority, and no explanation of how they were prejudiced. Accordingly, we find no basis for reversal.

As their tenth point, appellants contend that the evidence does not support a finding of continued environmental neglect. We disagree. Environmental neglect has been a continuing problem in the lives of this family as evidenced by the testimony of several witnesses, including W.B.'s grandfather, who was providing the home rent-free to the family. Photographic evidence was also presented that demonstrated the house was filthy, not simply cluttered as claimed by appellant Kristy Beverlin. Inconsistencies in testimony are resolved by the trial judge. *Dinkins v. Arkansas Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001). We find no basis for reversal here.

In their eleventh point, appellants contend that the evidence does not support the finding that further contact with the parents will be harmful. We disagree. The evidence was overwhelming in this case that the parents were not performing their parental responsibilities. W.B. lived outside the parental home almost as much as he lived in it.

Appellants have woefully failed to provide him with the security and stability that he needs. Living in a prolonged state of uncertainty and impermanence is harmful to a child. *See Bearden v. Arkansas Dep't of Human Servs.*, 344 Ark. 317, 42 S.W.3d 397 (2001). We find no clear error in the trial court's determination that further contact with appellants would be harmful to W.B.

As their twelfth and final point of appeal, appellants contend that the trial court's order terminating their parental rights to W.B. recites "other serious findings" that they argue are not supported by clear and convincing evidence. The findings challenged by appellants are that the parents had failed to remain clean and sober at all times; that the parents had failed to refrain from subjecting W.B. to drugs and drug paraphernalia within the home; that the parents had failed to maintain an environmentally clean and safe place for W.B. to live; that the parents had failed to provide stable housing and employment/income; that the parents had failed to maintain acceptable living conditions as implemented through intensive family-service workers; that the parents had failed to prove any benefit from the intensive family counseling, as well as individual and family counseling and anger management classes; and that the parents had failed to refrain from domestic violence within the home. Appellants' argument consists of listing the challenged findings as questions and then selecting favorable testimony to recite or otherwise commenting on the findings. What appellants fail to do is develop a cohesive argument with citation to legal authority that demonstrates why their position requires reversal. We find no basis for reversal. Finally, we note that appellants do not challenge

all of the grounds relied upon by the trial court, and it is only necessary to prove one statutory ground for termination under section 9-27-341(b)(3)(B). *See Benedict v. Arkansas Dep't of Human Servs*., 96 Ark. App. 395, ____ S.W.3d ____ (2006).

Affirmed.

BAKER and MILLER, JJ., agree.